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No. 09-480

In the Supreme Court of the United States

MATTHEW HENSLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Ex Post Facto Clause bars the application of the version of the advisory Sentencing Guidelines in effect at the time of sentencing when the version of the Guidelines in effect at the time of the offense provided for a lower advisory sentencing range.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 574 F.3d 384.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 2009. The petition for a writ of certiorari was filed on October 21, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of using a facility of interstate commerce to attempt to persuade a minor to engage in sexual activity, in violation of 18 U.S.C. 2422(b). Petitioner was sentenced to 125 months of imprisonment, to be followed

by five years of supervised release. The court of appeals affirmed his conviction and sentence. Pet. App. 1a-14a.

1. Beginning on August 7, 2006, petitioner, who had previously worked as a high school girls basketball coach, struck up a conversation in a Yahoo! chat room with undercover agents pretending to be a 13-year-old girl (Jen). Pet. App. 2a; Presentence Investigation Report ¶ 85-86 (PSR) . Jen told petitioner that she was 13 years old, and petitioner responded, "oh what the hell I'd still fuck you." Pet. App. 2a. During the course of the next two weeks, petitioner used four different screen names, each purporting to be a different person, to engage in sex-related on-line conversations with Jen. *Id.* at 2a-4a. As "MattyMac99," petitioner indicated that he wanted to meet Jen and was interested in having sex with her. *Ibid.* As "NPISCO26," petitioner pretended to be a 15-year-old girl and told Jen that "'she' loved having sex with older men because they were more experienced than younger guys." *Id.* at 3a-4a. Petitioner "also told Jen that thirteen was old enough to have sex" and "that her fears of pregnancy and sexually transmitted diseases were overblown." *Id.* at 4a.

On August 18, 2006, petitioner agreed to meet Jen near her house later that day. Pet. App. 4a. Petitioner drove near the designated meeting spot but observed police cars and did not stop. *Ibid.* In an online chat session that night, petitioner told Jen that he had not stopped because "there were cops everywhere" and he was concerned about being arrested. *Ibid.*

Federal agents arrested petitioner at his home the next day and executed a search warrant. Pet. App. 5a. The agents seized a computer and discovered that the screen names petitioner had been using to contact Jen had originated from that computer. *Ibid.* In addition,

agents learned that someone had attempted to delete those screen names from the computer. *Ibid.*

2. On September 8, 2006, a federal grand jury returned an indictment charging petitioner with using a facility of interstate commerce to attempt to solicit a minor to engage in sexual activity, in violation of 18 U.S.C. 2422(b). See PSR ¶ 3. At trial, the government introduced evidence of petitioner's prior online relationship with T.G., a minor from California who was 12 years old when petitioner first began chatting with her. Pet. App. 5a. Even though petitioner knew T.G.'s age, he had "engag[ed] in phone sex" with her and "had told her he was going to make preparations to fly out to see her." *Id.* at 5a-6a. The petit jury convicted petitioner of the instant offense. *Id.* at 6a.

Petitioner's sentencing was originally scheduled for October 31, 2007. See PSR ¶ 5; 2:06-cr-00168-PPS-APR Docket entry No. 80 (N.D. Ind. July 13, 2007). Accordingly, the Probation Office prepared the PSR using the 2006 edition of the United States Sentencing Guidelines (2006 Guidelines). PSR ¶ 54. Under the 2006 Guidelines, petitioner's advisory sentencing range, before consideration of the statutory mandatory minimum sentence, was 78 to 97 months of imprisonment. PSR ¶ 100. Under 18 U.S.C. 2422(b), however, petitioner was subject to a statutory mandatory minimum sentence of 10 years of imprisonment. As a result, petitioner's ultimate advisory Guidelines range under the 2006 Guidelines was 120 months of imprisonment. PSR ¶ 101; Sentencing Guidelines § 5G1.1(b).

On October 23, 2007, the district court entered an order vacating the October 31 sentencing date and resetting petitioner's sentencing for December 14, 2007. 2:06-cr-00168-PPS-APR Docket entry No. 93 (N.D.

Ind.). Therefore, on November 6, 2007, the Probation Office issued an addendum to the PSR that reflected changes in the advisory Guidelines in the 2007 United States Sentencing Guidelines (2007 Guidelines), which became effective on November 1, 2007. Under the 2007 Guidelines, petitioner's advisory sentencing range, without consideration of the statutory mandatory minimum sentence, was 121 to 151 months of imprisonment. 2d Add. to PSR ¶ 127. Because the bottom of that range was greater than the statutory mandatory minimum of 120 months of imprisonment, Guidelines § 5G1.1(b) no longer trumped the otherwise applicable advisory Guidelines range.

At his January 11, 2008, sentencing hearing, petitioner announced that his "only dispute" with the Probation Office's calculation of his advisory Sentencing Guidelines range was "as to which set of guidelines you use[,] 2006 versus 2007." Pet. App. 17a. Ignoring Guidelines § 5G1.1(b), petitioner asserted that under the 2006 Guidelines, his advisory Guidelines range would have been 78 to 97 months of imprisonment. *Id.* at 19a. The district court overruled petitioner's objection to using the 2007 Guidelines and calculated his advisory Guidelines range under those Guidelines as 121 to 151 months of imprisonment. *Id.* at 20a-21a. Petitioner subsequently asked the court "to craft a sentence of no more than 120 months, the mandatory minimum." 1/11/08 Sent. Tr. 41.

The district court rejected that request. The court noted that the Guidelines "now are one factor in conjunction with a whole host of other factors in [18 U.S.C. 3553(a)] that the [c]ourt should take into consideration in arriving at a sentence," and that "there is no presumption that the guidelines are, in fact, reasonable."

Pet. App. 24a. In light of the Section 3553(a) factors, the court concluded that it "d[id]n't think a sentence at the mandatory minimum is appropriate here." *Id.* at 25a.

In reaching that conclusion, the court elaborated that there were "a couple of points that [it thought were] really important." Pet. App. 25a. First, the court pointed out that petitioner had been communicating with Jen using multiple "different identities at the same time," which the court found to be "calculated" and "nefarious." *Id.* at 25a-26a. Second, the court found it "very troubling" that petitioner kept a "photograph of this young kid who was a student at" the high school where petitioner had been a coach and that photograph has his "semen on it." *Id.* at 26a. Third, the court noted that petitioner did not simply solicit sex from Jen online but "did in fact get in [his] car" and drive to the place where he was supposed to meet her. *Ibid.* The court "fully believ[ed] that had there been a 13 year old girl there," rather than "an undercover agent," petitioner "would have attempted to have sex with her." *Ibid.* Fourth, the court found "troubling" a text message that petitioner wanted "to quote, unquote, 'F'" his sister's 17-year-old tennis partner. *Ibid.* Finally, the court indicated that petitioner's behavior with T.G., the minor from California with whom he had a sexual relationship online, was also "troubling." *Id.* at 28a. For all those reasons, and "to deter people from contemplating doing this type of activity," the court did not sentence petitioner to the statutory mandatory minimum (120 months) or to the bottom of his advisory Guidelines range under the 2007 Guidelines (121 months), but instead imposed a sentence of 125 months of imprisonment. *Ibid.*

3. The court of appeals affirmed petitioner's conviction and sentence. Pet. App. 1a-14a. The court first

rejected petitioner's argument that the district court erred in admitting evidence of his online relationship with minor T.G. *Id.* at 6a-10a. Because petitioner contended that he believed that Jen was really 18, the court of appeals concluded that the evidence about T.G. "was highly relevant to showing the opposite; it demonstrated that [petitioner] had no qualms about pursuing a sexual relationship with a person he knew was a minor." *Id.* at 9a. Even without the evidence concerning petitioner's relationship with T.G., however, the court of appeals believed that "a reasonable jury easily could have found that [petitioner] was guilty of attempting to persuade Jen to engage in sexual activity with him in violation of § 2422(b)." *Id.* at 10a.

Next, the court of appeals rejected petitioner's argument that he had not taken a "substantial step" toward the completion of his Section 2242(b) offense. Pet. App. 10a-12a. The court explained that petitioner's conduct involved "much more" than "sex talk alone." *Id.* at 11a. Petitioner "'groom[ed]' Jen for sex by conversing with her using multiple online personas," he "arrange[d] a meeting place and time to meet her," and "he *actually traveled* to the meeting place, being deterred from the encounter only by the presence of law enforcement." *Ibid.* In addition, the court continued, there was evidence showing petitioner's "consciousness of guilt," including his "attempted destruction of the incriminating chat profiles after he noticed police near the prearranged meeting place." *Id.* at 12a.

Finally, the court of appeals rejected petitioner's challenge to the district court's use of the 2007 Guidelines, rather than the 2006 Guidelines, to compute his advisory sentencing range. Pet. App. 12a-13a. Petitioner acknowledged that the district court's decision was

consistent with the court of appeals' decision in *United States* v. *Demaree*, 459 F.3d 791 (7th Cir. 2006), cert. denied, 551 U.S. 1167 (2007), which had "held that a district court can apply a change in the Guidelines that expands a defendant's advisory guidelines range without offending the Ex Post Facto Clause." Pet. App. 12a-13a. Although petitioner recognized that *Demaree* was the law of the circuit, he suggested that the court of appeals make an exception to *Demaree* because the government had asked for the continuance of his sentencing hearing. *Id.* at 13a. Noting that petitioner did not contend "that the government intentionally delayed the sentencing so the [Guidelines] amendment would take effect," the court concluded that "[r]egardless of who sought the continuance, the district judge was entitled to take into account the change in the Guidelines when fashioning a sentence." *Id.* at 13a & n.5. "Because [petitioner] ma[de] no further challenge to his sentence," the court of appeals concluded, the court would "not disturb it." *Id.* at 13a.

ARGUMENT

Petitioner contends (Pet. 9-32) that the district court's use of the 2007 edition of the Sentencing Guidelines to calculate his advisory sentencing range violated the Ex Post Facto Clause of the United States Constitution. That claim does not warrant this Court's review.

1. First, this case is not an appropriate vehicle to address that issue because the district court's explanation of its sentencing decision leaves little doubt that the court would have imposed the same sentence even if the court had calculated petitioner's advisory sentencing range using the 2006 edition of the Sentencing Guidelines. After *United States* v. *Booker*, 543 U.S. 220

(2005), district courts are no longer required (or even permitted) to treat the Guidelines-recommended range as the presumptive sentencing range, and they may sentence anywhere within the statutory range based on appropriate consideration of the sentencing factors listed in 18 U.S.C. 3553(a). See *Gall* v. *United States*, 128 S. Ct. 586, 596-597 (2007). In reaching its sentencing determination, a court may (even if it is not required to do so) take into consideration that more recent versions of the Sentencing Guidelines would result in a higher advisory sentencing range. See *United States* v. *Demaree*, 459 F.3d 791, 795 (7th Cir. 2006), cert. denied, 551 U.S. 1167 (2007).

In the present case, the earlier, 2006 version of the Sentencing Guidelines resulted in a recommended sentencing "range" that was actually a single point, the statutory mandatory minimum sentence of 120 months of imprisonment. PSR ¶ 101; see Guidelines § 5G1.1(b). Although the district court did not use the 2006 Guidelines to calculate petitioner's advisory sentencing range, the court took the sentence recommended by the 2006 Guidelines into account and rejected that recommendation, expressly concluding that "something certainly above the mandatory minimum sentence is appropriate here." 1/11/08 Sent. Tr. 47; see Pet. App. 25a ("I don't think a sentence at the mandatory minimum is appropriate here.").

Even though the court, "speaking broadly," thought that a "10 year mandatory minimum" was generally "too high for these cases," the court determined that, in this case, a 10-year sentence was too low. Pet. App. 26a-27a. The court listed numerous reasons for its conclusion that petitioner's crime deserved an unusually harsh sentence, including petitioner's use of multiple online personalities

to groom Jen for sex, his use for sexual gratification of a photograph of a minor student at the school where he taught, his active attempt to meet Jen in person, his expressed interest in having sex with other minors, and his long online relationship with minor T.G. *Id.* at 25a-28a. Despite all those reasons for sentencing petitioner above the 120-month figure that represented both the statutory mandatory minimum and the 2006 Guidelines range, the court imposed a sentence of only 125 months of imprisonment, just five months higher than the minimum and near the bottom of his 2007 Guidelines range. *Id.* at 28a. Nothing in the record suggests that petitioner received a longer sentence because his 2007 Guidelines range was 121 to 151 months of imprisonment, rather than the 120 months recommended by the 2006 Guidelines.

2. In any event, the ex post facto issue raised by petitioner does not warrant this Court's review at the present time. Given the Court's recent decisions clarifying the role of the Guidelines in the post-*Booker* sentencing regime, the court of appeals correctly concluded that use of the Guidelines in effect at the time of sentencing does not violate the Ex Post Facto Clause. Although the D.C. Circuit has rejected that conclusion, that conflict does not currently warrant intervention by this Court. Indeed, the Court has recently denied petitions raising the same claim. See *Lumsden* v. *United States*, cert. denied, No. 09-5374 (Nov. 16, 2009); *Vincent* v. *United States*, 129 S. Ct. 2863 (2009); *Mower* v. *United States*, 129 S. Ct. 487 (2008). The Court should follow that course here as well.

a. Article I of the Constitution prohibits Congress or any State from passing any "ex post facto Law." U.S. Const. Art. I, § 9, cl. 3; *id.* Art. I, § 10, cl. 1. The ex post

facto prohibition "bars application of a law 'that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.'" *Johnson* v. *United States*, 529 U.S. 694, 699 (2000) (quoting *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)).

The Sentencing Reform Act of 1984 (SRA) generally requires that sentencing courts determine a defendant's sentence using the Sentencing Guidelines "in effect on the date the defendant is sentenced," rather than the Guidelines in effect at the time the defendant committed the crime for which he was convicted. 18 U.S.C. 3553(a)(4)(A)(ii). The Sentencing Guidelines likewise provided that a sentencing court "shall use the Guidelines Manual in effect on the date the defendant is sentenced," unless "the court determines that use of" that version of the Guidelines "would violate the ex post facto clause," in which case "the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed." Sentencing Guidelines § 1B1.11.

In *Miller* v. *Florida*, 482 U.S. 423 (1987), this Court held that the Ex Post Facto Clause barred the retroactive application of revised Florida Sentencing Guidelines that increased a defendant's presumptive sentencing range compared to the guidelines in effect at the time that the defendant committed the offense. The Court reasoned that the new guidelines "substantially disadvantaged" the defendant, because the state system created a "high hurdle that must be cleared before discretion [could] be exercised" to impose a non-guidelines sentence. *Id.* at 432, 435. The Court distinguished the Florida guidelines system from the United States Parole Commission's guidelines, noting that the federal parole guidelines "simply provide flexible 'guideposts' for use in the exercise of discretion." *Id.* at 435.

Before this Court's decision in *Booker*, the United States Sentencing Guidelines were mandatory, and a district court could sentence outside the Guidelines range only if the court found "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by" the Guidelines. 18 U.S.C. 3553(b)(1). In light of the mandatory nature of the Guidelines, the courts of appeals uniformly held that, under this Court's analysis in *Miller*, the Ex Post Facto Clause precluded application of revised Guidelines provisions that provided for a more severe sentence than authorized by the Guidelines in effect when the defendant committed the offense. See, *e.g.*, *United States* v. *Seacott*, 15 F.3d 1380, 1386 (7th Cir. 1994).

In *Booker*, however, the Court held that the mandatory Guidelines system violated the Sixth Amendment, and the Court remedied that violation by severing certain provisions of the SRA and thus rendering the Guidelines "effectively advisory." 543 U.S. at 245. The Court explained that, under the new sentencing regime, the SRA still requires "a sentencing court to consider Guidelines ranges, * * * but it permits the courts to tailor the sentence in light of other statutory concerns as well." *Id.* at 245-246. The Court in *Booker* did not describe the precise weight that the Guidelines would have in post-*Booker* sentencing determinations.

Accordingly, the courts of appeals developed various rules to elaborate on the role of the Guidelines in post-*Booker* sentencing. Those rules included a presumption, on appellate review, that within-Guidelines sentences were reasonable, see *Rita* v. *United States*, 551 U.S. 338, 341 (2007), and a proportionality principle, under which the farther a sentence varied from the advisory sentencing range, the stronger the justification required to sup-

port the sentence, see *Gall*, 128 S. Ct. at 591. The courts of appeals also almost uniformly concluded that a district court could not sentence outside the Guidelines range based on a policy disagreement with the Guidelines. See *Kimbrough* v. *United States*, 128 S. Ct. 558, 564 (2007). In light of those rules, the government took the position that, even after *Booker*, the Ex Post Facto Clause continued to prevent application of Guidelines amendments that increased a defendant's advisory sentencing range above the range that would have applied when the defendant committed the offense. See, *e.g.*, Br. in Opp., *Demaree* v. *United States*, No. 06-8377, 2007 WL 868878, at *3-*4.

This Court's recent decisions explaining the role of the Guidelines in post-*Booker* sentencing have, however, made clear that the Guidelines have a different role from what the government and most courts of appeals had previously believed. In *Rita*, the Court said that, although a court of appeals may presume that a within-Guidelines sentence is reasonable, such a presumption is optional. 551 U.S. at 341, 347, 354. See *Gall*, 128 S. Ct. at 597. The Court further stated that any presumption does not have "independent legal effect, [but] simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the [Sentencing] Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable." *Rita*, 551 U.S. at 350-351. And the Court added that the presumption of reasonableness is only "an *appellate* court presumption" that may not be applied by a sentencing court. *Id.* at 351. The Court stressed that neither the district court nor the court of appeals may apply "a presumption of

unreasonableness" to a sentence outside the Guidelines range. *Id.* at 354-355.

In *Gall*, the Court held that a court of appeals cannot apply a proportionality principle that would demand an increasingly strong justification the farther a sentence varies from the advisory guidelines range. 128 S. Ct. at 594. And, in *Kimbrough*, the Court held that, contrary to the view previously adopted by virtually all federal courts of appeals, sentencing "courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines." 128 S. Ct. at 570 (citation omitted). The Court recently reaffirmed that holding in *Spears* v. *United States*, 129 S. Ct. 840 (2009) (per curiam), reiterating that district courts generally have authority to vary from the "Guidelines based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case." *Id.* at 843.

The Court's other recent pronouncement on the Guidelines reinforces the view, expressed in *Kimbrough*, that the Guidelines are just "one factor among several" that "courts must consider in determining an appropriate sentence." *Kimbrough*, 128 S. Ct. at 564. In *Irizarry* v. *United States*, 128 S. Ct. 2198 (2008), the Court held that Federal Rule of Criminal Procedure 32(h), which requires a sentencing court to give notice to the parties before "depart[ing]" from the Guidelines on a ground not previously identified, does not require notice when a court sentences outside the advisory range based on the sentencing factors in 18 U.S.C. 3553(a). The Court explained that, after *Booker*, defendants no longer have "[a]ny expectation subject to due process protection" that they will receive a sentence within the Guidelines range. *Irizarry*, 128 S. Ct. at 2202.

In light of the Court's recent decisions clarifying that the Guidelines are now "purely advisory," *Demaree*, 459 F.3d at 794, the United States has determined that the Seventh Circuit adopted the correct legal rule in *Demaree*: the Ex Post Facto Clause does not bar the application of the current version of the advisory Guidelines at the time of sentencing, even when the version of the Guidelines in effect at the time of the offense provided for a lower advisory sentencing range. The Guidelines constitute advice, not legally binding rules that establish a "high hurdle that must be cleared before discretion can be exercised" to impose a different sentence. *Miller*, 482 U.S. at 435. Thus, notwithstanding petitioner's contentions (Pet. 24-32), the court of appeals correctly rejected petitioner's ex post facto challenge in this case.

b. Petitioner asserts (Pet. 10-14) that this Court's review is warranted because the Seventh Circuit's holding in *Demaree* and in the present case—that application of revised Sentencing Guidelines does not present an ex post facto problem—conflicts with the D.C. Circuit's decision in *United States* v. *Turner*, 548 F.3d 1094, 1099-1100 (2008). Petitioner acknowledges, however, that "[n]o other court of appeals has squarely decided whether the Ex Post Facto Clause applies to retroactive application of the now-advisory Guidelines." Pet. 14; see Pet. 14-20 (describing dicta in other cases). The narrow conflict between the D.C. and Seventh Circuits does not warrant this Court's review at this time.

Although the D.C. Circuit rejected the Seventh Circuit's ex post facto holding in *Demaree*, it did so without analyzing *Kimbrough* and without the benefit of the clarification of *Kimbrough*'s holding in *Spears*. Moreover, *Turner* was briefed and argued before the govern-

ment adopted its current position on the ex post facto question, and thus the D.C. Circuit issued its decision in *Turner* without a full exposition of the government's revised views. See Gov't Br. at 28-33, *United States* v. *Turner*, No. 07-3107 (D.C. Cir. filed Feb. 29, 2008) (implicitly conceding that the Ex Post Facto Clause precludes application of revised Guidelines that increase the advisory sentencing range); Letter from Edward Sullivan, Trial Attorney, United States Dep't of Justice, to Hon. Mark J. Langer, Clerk, United States Court of Appeals for the D.C. Circuit, re: *United States* v. *Turner*, No. 07-3107 (D.C. Cir.) (Aug. 22, 2008) (noting, in a post-briefing letter, that "the Department of Justice, effective August 8, 2008, is of the position that the Clause does not bar application of a post-offense amendment that increases the advisory Guidelines range").

If the conflict between the Seventh and D.C. Circuits persists, the issue may eventually warrant this Court's resolution in an appropriate case. But until the D.C. Circuit has an opportunity to revisit its views, in light of both this Court's recent decisions and the changed position of the United States, the conflict does not warrant the Court's review. In any event, this case would not present an appropriate vehicle to consider the question, because there is no reason to believe that the applicable rule would have made a difference in petitioner's sentence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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